

STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

STATE HISTORIC PRESERVATION DIVISION 33 SOUTH KING STREET, 6TH FLOOR HONOLULU, HAWAII 96813 MICHAEL D. WILSON, CHAIRPERSON BOARD OF LAND AND NATURAL RESOURCES

> DEPUTY GILBERT COLOMA-AGARAN

AQUACULTURE DEVELOPMENT PROGRAM

AQUATIC RESOURCES

ENVIRONMENTAL AFFAIRS
CONSERVATION AND
RESOURCES ENFORCEMENT

CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION

DIVISION
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

AGENDA MOLOKAI ISLAND BURIAL COUNCIL MEETING

Date:

Wednesday, March 20, 1996

Time:

6:00 p.m.

Place:

Kaunakakai School Cafeteria

Ala Malama Street

OFFICE OFFICE

- I. OPENING REMARKS
- II. APPROVAL OF NOVEMBER 21, 1995, AND FEBRUARY 21, 1996, MEETING MINUTES
- III. BUSINESS
 - A. Case Updates and Notice of Inadvertent Discovery:
 Information/Recommendation: update of ongoing cases, arrangements
 for reburial where necessary, and other follow up by SHPD, including
 inadvertent discovery of human skeletal remains at Kai'ehu Point,
 Mo'omomi.
 - B. Proposed Administrative Rules, "Rules of Practice and Procedure Relating to Burial Sites and Human Remains"
 Information: review and discussion of selected sections subject to recent revision.
- IV. ANNOUNCEMENTS
- V. ADJOURNMENT



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MINUTES MOLOKAI ISLAND BURIAL COUNCIL MEETING

Date:

Wednesday, March 20, 1996

Time:

6:00 p.m.

Place:

Kaunakakai School Cafeteria

Ala Malama Street Kaunakakai, Molokai

ATTENDANCE:

Council: William Akutagawa Jr.

Anna Goodhue Lawrence Aki Pearl Hodgins

Staff:

Edward Halealoha Ayau, Esq. Burials Director

ABSENT:

Noelani Meyer Keliikipi (Excused)

Randy Fujimori

Henry Ayau (Excused)

GUESTS:

Edwina H. Caconlidis (Ho'olehua Hawaiian Civic

Club)

'Ainahau Tinao

Luana E. Hamakua (Kamilaloa One Alii Homestead)

I. OPENING REMARKS:

Chairperson Billy Akutagawa called the meeting to order at 6:33 p.m.

Eddie Ayau thanked everyone for attending the meeting and said the reason for the special evening meeting is to give the community an opportunity to hear an explanation of the Administrative Rules that are pending promulgation. He explained when the Department held public hearings on the proposed rules last year, one of the comments received from Molokai was that there wasn't enough time for the community to receive this document, read it, and have a round table discussion.

Ayau said Council Member Gloria Marks, who was the Kalaupapa representative recently resigned. He informed the Council that the Department recently submitted its list of nominees to the Council. Ayau said Henry Nalaielua agreed to represent Kalaupapa to serve on the Council and that SHPD has also submitted names of Edwina Caconlidis, Alapai Hanapi'i, Wade Lee and Luana Hamakua to be regional representatives. There are already three landowner [representatives] on the council.

II. APPROVAL OF NOVEMBER 21, 1995 AND FEBRUARY 21, 1996 MEETING MINUTES:

The approval of the minutes of November 21, 1995 and February 21, 1996 was unanimously accepted as distributed (Hodgins/Aki).

It was unanimously approved to amend the agenda to move Item B, Proposed Administrative Rules to become Item C and to include as Item B, Discussion of letter from Ellen Osborne to the Community (Aki/Hodgins).

III. BUSINESS:

A. Case Updates and Notice of Inadvertent Discovery Information/Recommendation: update of ongoing cases arrangements for reburial where necessary, and other follow up by SHPD, including inadvertent discovery of human skeletal remains at Kai'ehu Point, Mo'omomi.

1) MO'OMOMI

Ayau said reburial of three skulls that were returned from the Chu family that was removed from the Mo'omomi

area in the 1920s took place in January, 1996. He said it was taken back to the Keonelele which has been designated for reburial on property owned by the Nature Conservancy which is set aside for conservation. It was reinterred in the general vicinity of the remains that were repatriated from Bishop Museum and other museums.

2) KAI'EHU POINT

Ayau said although it hasn't been verified yet the department received a call of possible human remains being exposed at Kai'ehu Point which is on Nature Conservancy property in the Keonelele area. The remains were left in place and covered. He said he will record the location of the site for future reference. Ayau stated that Molokai is curently the only island that does not have any human remains awaiting reburial.

B. Letter from Ellen Osborne to the Community.

Akutagawa referred to the November 21st minutes in which the Council proposed that a press release be prepared for publication to explain the circumstances of what occurred but that a retaliatory letter [from Osborne] was published in the local papers. He felt the letter was not factual and painted a distorted picture of the Burial Council. Akutagawa said Osborne came before the council to express some remorse but didn't feel it was "sincere or genuine".

Ayau explained that prior to December, 1994 a phone call was placed by John Sabas to the Department. Sabas said rumors were that massive amounts of human remains had been disturbed at Mapulehu Glass House. The second caller, Charles Crane, a neighbor [to Osborne] said he knew that it happened. Ayau said he and DOCARE Officer Keith Shiroma asked for and was granted permission to go on to the property. He said a former employee offered to take and show them the site told them of five skulls that was placed in a bucket under a tree. When the person went to get the bucket, it was no longer there. Ayau and Shiroma walked the area and found a field of bones sticking out of the ground. Ayau said the bones were bleached white which indicated that they had been exposed to the sun light for some time. lessee, Ms. Osborne, claimed that they were not human remains but that of animals. Ayau said he called the police as required for inadvertent discoveries and they confirmed that it was SHPD's jurisdiction because the remains were over 50 years old. Ms. Osborne refused to give boxes or bags to put the remains in. Ayau said bulldozing and

grading pushed a lot of the large boulders against a marsh area. He said while collecting the remains he found 3 or 4 skulls and some long bones stacked in between the boulders as if someone had collected them and stashed them away. Ayau said this triggered an investigation by SHPD which took a year and a half.

Ayau said Ms. Osborne's main contention was that SHPD never proved that the remains were human. He said two archaeologists verified that they were human and the person who initially discovered it was an ex-army person who was trained in [recognizing] human remains. The ethnicity of the remains were based on the objects that were found with them. There was an adz's head and shark teeth found with these remains.

Ayau said in the letter by Osborne, she indicated that because there was no proof that they were Hawaiian [remains] that it wasn't a violation. He explained that the law doesn't say that it's only illegal to disturb Hawaiian remains, it says it's illegal to disturb any human remains. The expert archaeological opinion said that these remains were clearly over 50 years old based on deterioration and that these remains were estimated to represent between 30 and 60 individuals. He said testimonies from former workers said that they were quite aware that these were human and that they were ordered to do certain actions with respect to hiding the remains.

Avau explained the law which calls for a \$10,000 fine for each burial and since SHPD estimated a minimum of 30 individuals that the maximum fine should be \$300,000. said the Attorney General's office decided to settle the case for \$50,000 and structured the settlement so that if Ms. Osborne complies with all these conditions, they'll forgive \$40,000 and that she would pay only \$10,000. the conditions included her coming to the council and expressing her remorse for what took place and she did that at the November meeting. The other condition was that she work 150 hours of community service for a Native Hawaiian organization on Molokai. If any of the conditions were violated, she would have to pay the full \$50,000 fine. matter was brought up to the Council and they agreed it was time to put this matter to rest.

Ayau said at the November 21st meeting with Ms. Osborne present, a motion was made by the Council to do a press release to explain the settlement of a \$50,000 fine and the conditions attached. They felt it was a way to educate and make the community aware of the burial council's work and the burial program. Ms. Osborne said she would agree to it only if her attorneys could review the language of the press

release. Ayau felt that the press release was neutral and it explained what took place in an objective fashion.

There was a discussion about writing a response back to clear up some of the misleading information that was in Ms. Osborne's letter. Lawrence Aki spoke of his experience with Ms. Osborne and said she will respond back. He felt after this letter is written to clarify the facts that this should be the end of the issue and that there should be no more rebuttals. Everyone was in agreement and all agreed that the letter should be written by the Council.

Ayau stated that the other defendant in this case was Thomas Waipa. He said the Attorney General's office is trying to enter into a similar settlement agreement in which Waipa would have no fine, but that he come before the Council to express remorse for what took place and that he work 150 hours of community service. Ayau said at this point they are still trying to track him [Waipa] down.

In response to who is responsible for the maintenance of the site, Ayau said the State and the landowner, Hawaii Sugar Planters Association executed a reburial agreement and that the area of almost three-quarter of an acre is set aside as a perpetual easement on the property.

C. Proposed Administrative Rules, "Rules of Practice and Procedure Relating to Burial Sites and Human Remains" Information: review and discussion of selected sections subject to recent revision.

Ayau referred to the proposed rules, Page 300-3, Purpose. He explained that the previous draft rules said that photographs of the iwi is only allowed where a person has consent of the family. Majority of the testimonials were in support of that and those who objected to that were principally interested in research and developing knowledge about traditional Hawaiian culture. Their argument was that photography was the best and easiest form of recording information from human remains. In the best interest of the State, it was decided to delete the rule to make it a punishable offense to take photographs. The Chairman felt it too harsh and was more in favor of a dialogue occurring between people who want to take the picture, the Council and anybody else who may object to that. He thought that through the dialogue, both sides could be educated on what the concerns are and that either photographs won't be taken because that person requesting it would understand that this is something that this particular community objects to, or the photographs would be taken because the Council felt that it was appropriate. The Chairman's instruction was to

delete the section on photography and insert in the purpose section the following statement,

"Photographing of human skeletal remains reasonably believed to be Native Hawaiian may take place only after consultation with known lineal descendants, the Council, or any appropriate Hawaiian organization".

Ayau explained that this is a policy statement which would serve as a guideline for the Department but at the same time it is unenforceable. The archaeological firms that work in Hawaii were notified that the SHPD will not accept reports that include [photographs] of human remains which is a way of getting them not to do it and also to encourage this dialogue between the Hawaiian community. Ayau said this policy applies to SHPD's staff archaeologists also and is in effect now.

Ayau noted that the statement says "consult"...not "consent". He said in the previous draft, they need permission, this, they don't. They need to talk to any one of these entities and even if the entities said no, there's no requirement for consent.

Section 300-3 Jurisdiction. Ayau explained that this law establishes the burial councils and the only burial sites that the council and the department has jurisdiction over are burials of remains that were buried for more than 50 years and that are unmarked. The definition of "unmarked" on page 8 with regard to a human burial site is any burial site that is located outside of a registered cemetery. If a cemetery is a registered cemetery, the council does not have jurisdiction. The department has some authority if someone wants to relocate the cemetery but that is governed by a separate statute.

Section 300-9 Government Records. Ayau said a general rule is that most government records are subject to public disclosure meaning whatever government does, the public has the right to know what's going on and what they are doing. He said when the burial law was passed, the legislature made an exception to public disclosure with respect to records relating to the location and description of historic and burial sites. The council or the family or a Hawaiian organization can request that the Department not disclose any information to the public. Ayau said this section defines what a location and a description record is because those are the two types of records the council can exempt. He said SHPD takes whatever reasonable steps necessary to prevent access to the public, including its own staff.

There is an exception for the Department to view these records in the event of an emergency, or where the identity of the *ohana* that the graves may be affected by. The council needs to take action to specifically exempt records.

Section 300-22 Composition. This section addresses the makeup of the councils and that the law requires a representative from each region of the island to serve on the burial council. Ayau said since Molokai doesn't follow traditional system in terms of districts the Department divided the island into four sections, West Molokai, Central, East and Kalalau. He said the idea is if a burial is found in that area, the representative would know the families and he/she would be able to advise the Department as to who to contact in trying to find the family. When there is no family, then the role of the council comes in.

Subsection (b) (2). Lists the criteria of the council members. One general requirement is possessing understanding of Hawaiian culture and to bring their own experience to the council to deal with this issue. The other requirement is to not simultaneously serve on another state board or commission. Ayau explained the process in which the Department would ask Hawaiian organizations to submit candidates or to have them submit a resume or information about what knowledge this person has. The other type of representatives are the development and large property owners. Although the council members are not paid for serving on the council, their expenses are reimbursed.

Section 300-24. Duties and Responsibilities. This section addresses what the primary duties and responsibilities are for the council. The primary responsibility is to determine whether to preserve in place or relocate previously identified Native Hawaiian burial sites. Ayau explained a previously identified burial site as 1) either identified by oral testimony or 2) by archaeological study. He also explained the procedure for someone who wants to develop their property to apply for grading, grubbing and building permits. The County sends the permit application to SHPD and the staff archaeologists reviews it. If it is believed that the property may be sensitive for historic sites or burials, a condition to conduct archaeological survey is placed on the granting of the permit. The survey is done and burial sites are identified. If based on the information that was gathered there is reason to believe that the individuals buried there are Native Hawaiian the applicant has to come before the burial council. A burial treatment plan has to be prepared proposing treatment of the burial site whether to leave it in place or to relocate them. Ayau said the council has the ultimate authority to decide whether to leave that Hawaiian burial site in place or to relocate it. When the council acts on a previously identified burial, they are making a determination and the council has 45 days to decide.

Ayau explained an inadvertent burial as not knowing that a burial is there and the remains are encountered. SHPD has jurisdiction over inadvertent discovery and a shorter time period [1 to 3 days] to decide treatment. The reason for the shorter time period is that projects cannot be shut down for long periods of time.

Ayau said another responsibility for the council is to assist SHPD in inventorying Hawaiian burial sites. The reason for the State wide inventory which is a master list of where all the unmarked burial sites are is to match the tax map key with a permit application to flag it for burials. A condition on the permit is then placed for the treatment of the burial sites.

The council also has the authority to make recommendations to the Department on any matter relating to burials. The council maintains a list of Hawaiian organizations to consult with. The council also elects a chairperson and vice-chair for four years.

Another council authority is the recognition of people who come forward and claim that they are lineal descendants. This is important in that the council can only preserve burials in place for certain reasons and one reason is where there are known lineal descendants. If a person comes forward and is able to establish that they are descendants from a person in this burial site, they can tell the council yes or no in terms of treatment.

When a project is going on and the Department requires an inventory survey and the survey indicates a burial there, the Department tells the landowner that he has to do a burial treatment plan and publish notice in the newspaper. A person can respond to the department's staff genealogist who requests them to submit information about the family and that oral information is acceptable also. The staff genealogist reviews all of the records and drafts a recommendation to the council, the council then decides whether or not to recognize them or not.

Ayau explained that there are two types of descendants. 1) lineal descendant, 2) cultural descendant. A lineal descendant is divided further into 2 types of people, someone who can show that they are directly descendant from

the burial, the other called a collateral descendant, a descendant who has a common parent. He said the law also provides for recognition of cultural descendants, for Hawaiians, a cultural descendant is someone who can show that they have tutus buried in the same ahupua'a. The difference is that if they are lineal descendants, the council almost has to listen to what they say in terms of treatment. If they are cultural descendant, the council gives whatever weight it wants to that but they still have the say.

Section 300-25 (d). One of the authorities the council has is to close a [public] meeting if someone is going to talk about the location or description of a burial site and the other is if they want to consult with their attorney.

Section 300-31. Burial site identification; ethnicity evaluation. Ayau said this section defines how the Department evaluates ethnicity and identifies burial sites because those are the elements that have to be satisfied before it triggers councils' jurisdiction and then triggers the Department's jurisdiction. One of the ways to identify burial sites is by oral testimony. This section says one way one can identify burial sites is if someone comes forward and says so. The entity that decides whether that information is credible or not, is the council. The witnesses shall provide information regarding the location and description of the burial site, then the council recommends to the Department whether to accept the testimony If the burial site is recognized by the Department or not. based on the oral or written testimony the council accepted, then that burial site is identified as previously identified and comes to the council for determination, (b) the other way to identify them is through archaeological survey, (c) the Department is responsible to develop a statewide This explains the procedure as (1) consult inventory. knowledgeable people within a community about where these burial sites may be located, (2) acquire authorization from the landowner for access to the property, (3) inspect and document the location and description of the burial site, (4) place the information on the inventory and (5) provide a written notice to the landowner that the burial sites have been identified. Ayau said this places them on notice so that there is no accidental disturbance.

Ayau said the information on the inventory is very extensive and that there is a provision on page 21 (e), if lineal descendants disagree about the amount of information that's going to be put into this inventory, they can tell the Department no. The only information that the Department

will place on the inventory if a family objects to it is the tax map key. Ayau said documenting a burial includes photography of the surface and describing what's on the surface.

Ayau said an evaluation of ethnicity is to first conduct a cultural evaluation. SHPD staff genealogist will ask that person and get some information about who's buried there or do research regarding the history of the particular area and any traditions associated with that area and also do genealogical searches. If the information is found to be reasonable, to infer that the person buried there is Hawaiian, then the burial is treated as a Hawaiian burial site.

If for some reason the information is insufficient, then the next level of inquiry is an archaeological one. This means that the archaeologist will examine any archaeological evidence by digging in the area and finding objects or do dating of soil but not evaluating the bone. If that information turns out to be reasonable enough to infer that that person is buried there is Hawaiian, then the evaluation ends and the burial is treated as Hawaiian.

If for some reason it's insufficient, then the combination of cultural and archaeological information is gathered to see if any reasonable inference that the burial is Hawaiian based on evidence can be made. If that inference cannot be made, the 3rd level of evaluation is osteological study. Osteological study is the physical examination of human remains. Ayau said it is now limited to measurement of remains and observation of characteristic on the remains. If after physical study, they still don't know the ethnicity, the remains will be treated as ethnicity unknown and the department will conduct the reburial.

section 300-32 Physical examination of human remains. Ayau said this level takes effect if levels 1 and 2 does not have enough information to make a reasonable inference. The rules specifically says that the examination consists only of observation of metric, non-metric, or other relevant traits [meaning measurements]. Any destructive examination methods including x-ray, radio carbon dating which is a form of destroying the bones and burning it and then dating the carbon that's left, is prohibited unless a written request is made to the department and approved by the department in writing. In those cases the Department will come to the council if the remains are Hawaiian. If an examination is decided to take place, it has to occur on the island where the remains originated from and at a location that the Department approves of. Within 30 days after the

examination, the person who conducted it has to submit a report of their findings to the Department which is reviewed by the staff anthropologist.

Section 300-33 Request for council determination to preserve or relocate Native Hawaiian burial sites. Ayau said this explains all the requirements that an applicant has to go through in order to get a decision from the burial council and is the development of a burial treatment plan. Part of the requirement is to publish notice in the paper, to research the area that the burial site is in to try to determine what families may have been associated with the burials, to inquire with any knowledgeable person about families from that particular area. It tells the applicant what statements are required to be in the plan. The draft is submitted to SHPD, approved and placed on the next burial council agenda. From that day the council has 45 days to decide the case.

Ayau referred to page 28, (h) and said this is to make sure that remains are not removed prior to a council's determination. If removal of those remains occurs prior to that then it would be intentional removal meaning that a person could be prosecuted for it.

Section 300-35 Recognition of lineal and cultural descendants. This explains for someone who is claiming lineal descent, all the types of records they can submit, how the Department will review the records, and the recommendation that the Department will make to the council to identify the claimant.

Ayau referred to page 33, section (h). If a person cannot establish lineal descent but that they are Hawaiian and can show that their tutus are buried in the same district, they can be recognized as a cultural descendant and the council decides to recognize them as a cultural descendant and how much weight to give that testimony.

Section 300-36 Criteria for evaluating request to preserve or relocate Native Hawaiian burials sites. Ayau said the council can only preserve a Hawaiian burial in place if it meets any of the 5 criteria. (1) when the burials are located in areas with a concentration of skeletal remains, (2) a pre-contact (before Cook's arrival) or historic period (after Cook's arrival) burial sites associated with important individuals and events as recommended by the council following consultation with known lineal or cultural

descendants, appropriate Hawaiian organizations, knowledgeable individuals, or any other appropriate source of information, (3) when the burial is located in areas within a context of historic properties (historic property is any inanimate thing, that's over 50 years old), (4) where known lineal descendants request preservation in place and, (5) where the landowner agrees to preservation in place.

Subsection (b) lists all the types of issues that the council has to consider when it makes its decision (1) cultural appropriateness of the proposal to preserve in place or relocate, (2) any possible harm to the Native Hawaiian skeletal remains if the burial site is left in place, (3) the request of known lineal or cultural descendants to relocate and, (4) any reason presented by the applicant to relocate.

Ayau said **Section 300-37** was added to deal with non-Hawaiian burials.

Section 300-38 Council determinations. When someone applies to the council to decide treatment of a burial and the council has to consider all the provisions that are in the burial treatment plan, weigh all written and oral evidence, consider and apply the preservation criteria, and consider all of the other factors that may be involved and make the decision. Once the council makes it's decision, the Department has 10 days to formally notify the applicant on the decision of the council. Ayau said the letter would (1) notify that the council decided to preserve the burial in place or decided to relocate, (2) these are the recommendations that the councils made regarding their decision that the Department accepted, (3) if the applicant disagrees with the decision, the first option is to request reconsideration but in order to get them to reconsider, they would (1) have to provide evidence that wasn't available initially to the council and that is new evidence that would have a profound affect on the outcome of the case and, (2) the council has to agree to reconsider its decision, not the Department.

If the council grants reconsideration, another public meeting is held and additional information is presented and the council makes its new decision. The other option is the applicant can accept the decision and proceed with preserving the remains in place or having them relocate it. The third option is to file an appeal. The law says that any owner or any applicant who disagrees with the council's decision to preserve in place or to relocate, can appeal the

decision. The board that hears the appeal is made up of 6 people; 3 members of the State Land Board, 3 island burial council Chairpersons one of whom would be the Chair from the island the appeal is being made. If the decision is split, the Chairperson of the hearing casts the deciding vote.

Section 300-41 Private possession of human remains. Ayau felt this section could be controversial. He said a person is prohibited from privately possessing human remains that are over 50 years old that was knowingly removed from a burial site except where (1) private archaeological firms are holding on to the remains until they get reburied, (2) if you are a lineal descendant and want to keep the remains in your house, (3) if possessing the remains is an ethnically acceptable practice, (4) human remains have been manufactured into artifacts like fish hooks. Ayau said if none of these exceptions are met and the *iwi* is in one's possession the State can prosecute them for it. He said the Department is giving 2 years to turn remains in and the idea is to stop people from raiding burial sites.

Section 300-42 <u>Illegal sale of human remains and burial</u> goods and removal from the State. It's unlawful for anyone to offer for sale or to exchange human remains or for any person who wants to remove remains from the State of Hawaii without a permit from SHPD.

Section 300-43 <u>Penalty</u>. Talks about the penalties that someone can enforce against someone if one violates the law in which they knowingly take, appropriate, excavate, injure, destroy or alter any burial site or the contents thereof, located on private lands or lands owned or controlled by the State, or any County land.

Ayau updated the council on the rules status and said that it has already been approved by Office of State Planning and Budget and Finance. He said after approval by DBED, the Governor will authorize a public hearing and the notices will be published in the paper. He said everyone that testified last year will get a notification of when the hearings are going to be held.

IV. ANNOUNCEMENTS

VII. ADJOURNMENT

At 8:30 p.m. the meeting was unanimously moved to adjourn (Hodgins/Aki).

Transcribed by,

Saubaca Kameda

Barbara Kameda